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No. 384

In The

United States Supreme Court

October Term, 1956.

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION FOR A WRIT OF CERTIORARI

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INITIATED ORDINANCE 16922

Section 13. Violations; Penalties. Any person, firm or corporation subject to the provisions of this ordinance who shall wilfully fail, neglect or refuse to make any return or declaration, or any employer who shall wilfully fail, neglect

or refuse to deduct, withhold and pay the taxes imposed by this ordinance and as required by Section 5 hereof, or any taxpayer who shall wilfully refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Superintendent of Taxation, or any duly authorized agent or employee, to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return or declaration of estimated tax, shall be guilty of a misdemeanor and shall be fined not more than One Hundred Dollars ($100.00) for the first offense, and shall be fined not more than Five Hundred Dollars ($500.00) or imprisoned not more than sixty (60) days, or both, for any subsequent offense. The failure of any employer or taxpayer to receive or procure a return or declaration form shall not excuse him from making a return or declaration or from paying the tax imposed by this ordinance.

STATEMENT OF FACTS AND OPINIONS RENDERED IN STATE COURTS

Petitioners Focke and Creager were arrested upon warrants issued by a duly qualified, appointed and acting deputy clerk of the Municipal Court of Dayton, Ohio.

Petitioner Focke seasonably filed his motion to quash the affidavit and warrant and appeared in Dayton Municipal Court only for that purpose. The motion to quash was denied by Emmett J. Jackson, Judge, Dayton Municipal Court.

When the motion to quash was denied Mr. Focke applied to the Court of Appeals of this district for a writ of habeas corpus. Under the Ohio Constitution the Court of Appeals is one of the Courts that has original jurisdiction in Habeas Corpus cases.

Petitioner Creager, after warrant served, and before arraignment in the Dayton Municipal Court applied directly to the Court of Appeals for a writ of habeas corpus.

Both cases were submitted to the Court of Appeals of this district on briefs and oral argument. On November 17, 1955, the Court of Appeals denied the writ and rendered the following opinion.

MILLER, J.:

"This is an action in habeas corpus wherein the relator alleges that he is being unlawfully restrained of his liberty for the reason that the warrant upon which he was arrested was not issued in accordance with law.

"The record reveals that the relator was arrested upon an affidavit sworn to by George Wartzbaugh, an investigator of the City Income Tax Department for the City of Dayton, charging him with a misdemeanor under Section 13 of Ordinance No. 16922 in that he refused to permit a duly authorized agent of the Superintendent of Taxation of said City to examine the books, records and papers of the relator for the purpose of ascertaining whether or not there was any tax due; that said affidavit was sworn to before one V. Richards, a deputy clerk of the Municipal Court of said City, who thereupon issued a warrant for the arrest of the relator upon the filing of said affidavit in the Municipal Court.

"The record reveals further that the relator is now being restrained of his liberty by virtue of the arrest under said warrant.

"The question presented is whether the deputy clerk had authority to issue the warrant, or may such writ be issued only by the clerk of said court? R. C. 2935.10 provides:

> " 'Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof.'

"The power of the clerk is also defined in the Uniform Municipal Act, to-wit: R. C. 1901.31, Section (E):

> "'The clerk of a municipal court shall have * * * power to issue and sign all writs, process, subpoenas issuing out of the court * * *.'

"The duties of a deputy clerk of such court are defined by section (H) of the above statute, to-wit:

> "'* * * Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. * * *.'

"The law defining when a warrant may issue is set forth in R. C. 2935.11, to-wit:

> "'When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.'

"Counsel for the relator urges that under Section 1901.31 of the Revised Code the clerk has the *power* to issue the warrant and that R. C. 2935.11 requires that in exercising such *power* he must determine if reasonable grounds exist to believe that the offense charged has been committed. It is the contention of the relator that the power conferred upon the clerk requires an act of discretion which may not be delegated to a deputy. But we find that the Ohio authorities do not support the conclusion that such power is discretionary. It is said in 5 O. Jur. (2d) 27, Section 12, that the issuance of a warrant is a ministerial act, which may be compelled by mandamus. Citing Hornack v. State, 39 O. App. 203, 177 N. E. 244, and State ex rel. Goodman v. Redding, 87 O. St., 388, 101 N. E. 275. In the Hornack case, supra, the court held that

even in the issuing of a search warrant a ministerial act is involved, and a finding of probable cause by a judge or magistrate is not required. It is interesting to note that the opinion in this case was written by Judge Weygandt, who stated on page 205:

> " 'Before commenting upon the wording of the newly-enacted statute in question, it should be noted that by the great weight of general authority the issuance of warrants, whether for search or for arrest, is regarded as a ministerial act. In 5 Ruling Case Law, 626, under the subject of 'Clerks of Courts', appears the following:
>
> > " " 'The courts uniformly hold that the office of clerk of a court of justice is ministerial, and that it includes no judicial authority except by constitutional or legislative provision. There is some conflict of opinion as to the judicial or ministerial nature of certain specific duties of a clerk of court; but if his official duty is prescribed by law, then his action in performance of that duty is ministerial.' '

"And at page 206:

> > " " 'When an official duty does not belong inherently to the office itself, but may be devolved upon some other officer to perform, it is ministerial and its performance may be required by mandamus.
>
> > " " 'The duty assigned by statute to a municipal court judge of issuing warrants, where the complaint and affidavits are sufficient, is ministerial and one which may be controlled by judicial power, and mandamus lies to compel the issuing of such warrants.'
>
> " 'Then, too, in the Rosanski case, supra, the opinion contains the general statement that the issuance of warrants, whether for search or for arrest, is a ministerial act.'

"It should also be noted that R. C. 2935.10 provides that any clerk of a court of record, or municipal court, may issue process for the arrest of a person charged with an offense. The word 'power' is not found in this section as in R. C. 1901.31, which relator relies upon. This section clearly indicates that no discretion is required to be exercised by the clerk for the issuing of a warrant, but that it is a duty imposed upon the clerk.

"Relator cites the case of Nicholas v. Cleveland, 125 O. St., 474, but this case is not parallel with the case at bar for it involved a search warrant issued by a deputy clerk when the statute did not give such power to the clerk. G. C. 13430-3 then provided:

> " 'A warrant for search shall not be issued until there is filed with the judge or magistrate, an affidavit. * * *.'

"It will be noted that under this section no provision is made for filing the affidavit with the clerk. In holding that the clerk had no power to issue the warrant, the court stated, at page 479: 'The clerk is merely a ministerial officer; his function is to carry out the orders of the judge.'

"It therefore appears to this Court that the arrest of the relator was lawful. When such facts appear a discharge from custody by a writ of habeas corpus can not be allowed. In re Burson, 152 O. St., 375:

> " 'Where a person restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and the court or magistrate had jurisdiction to issue the process, render the judgment or make the order, a discharge from custody by the writ of habeas corpus will not be allowed. Such person has an adequate remedy at law by way of review on appeal.'

"See also R. C. 2725.05.

"We are therefore of the opinion that the writ may not be allowed.

"HORNBECK, J., and COLLIER, J., of the Fourth District, sitting by designation, CONCUR."

On the same date (November 17, 1955) the Court of Appeals for the Second District of Ohio rendered the following opinion in State, ex rel Creager:

"By the Court:

"This is a companion case to No. 2348 (Focke Case) * which this day has been decided by this Court. The writ will be denied for the reasons indicated therein.

"Miller, P. J., Hornbeck, J. and Collier, J., concur."

Petitioners asked for a rehearing in the Court of Appeals of the Second Appellate District of Ohio and on January 4, 1956, the following opinion was rendered by that Court.

"By the Court:

"This is an application for a rehearing in which it is urged that the warrant for the arrest of the relator was issued in violation of his Constitutional rights as set forth in Article I, Section 14, of the Ohio Constitution, and the Fourteenth Amendment to the Federal Constitution.

"As stated previously, we are of the opinion that the filing of the affidavit constituted 'probable cause' for the issuing of the warrant for arrest under the provisions of R. C. 2935.11; that when such an affidavit is properly filed, the action of the Clerk in issuing the same is ministerial and not judicial in nature. In State v. Gutilla, 59 O. L. Abs., 289, this Court held in Syllabus 1:

> " 'An affidavit which states that the affiant has reasonable grounds to believe that an offense has been committed is sufficient to require the issuance of a warrant under Section 13432-9 OGC.'

*(Focke case) added.

"Therefore, there has been no infringement of any rights guaranteed to the relator by either the State or Federal Constitutions.

"The application is denied.

"MILLER, P. J., HORNBECK, J., and COLLIER, J. of the Fourth District, sitting by designation, CONCUR."

Appellants, Focke and Creager, appealed as of right to the Supreme Court of the State of Ohio. Briefs were submitted by counsel and the cases were submitted after oral argument on May 22, 1956.

On June 5, 1956, the Supreme Court of Ohio rendered the following opinion:

"Appeals from the Court of Appeals for Montgomery County.

"Appellants, Focke and Creager, residents of the City of Dayton, were arrested by the Dayton police upon affidavits sworn to before a deputy clerk of the Municipal Court of Dayton and warrants of arrest forthwith issued by such deputy clerk in the name of her superior, without a determination by a judge, clerk or magistrate of reasonable grounds to believe that the offense charged had been committed. The offense charged in each case was a misdemeanor, namely, a violation of the city income tax ordinance, in that the appellant refused to permit an examination of his books and records.

"Creager at once filed a petition in habeas corpus in the Court of Appeals.

"When arraigned, Focke refused to plead or in any manner acknowledge jurisdiction of the court over his person, but filed a motion to quash for lack of due process. The Municipal Court overruled the motion. Focke then filed a petition in habeas corpus in the Court of Appeals.

"Appellants contended that the deputy clerk of the Municipal Court was without statutory authority to issue the warrants for arrest without a determination

by a judge, clerk or magistrate of reasonable grounds to believe that the offenses charged had been committed, and that their issuance was in violation of appellants' constitutional rights to due process and to be secure from unreasonable search without probable cause.

"The Court of Appeals denied the relief sought in each case.

"Appeals as of right bring both causes to this court for review.

(Names of Counsel deleted.)

"*Per Curiam*: The appellants have an adequate remedy at law by way of appeal. The judgments of the Court of Appeals are affirmed on authority of Yutze v. Copelan, Chief of Police 109 Ohio St., 171, 142 N. E., 33, 32 A. L. R., 1048.

"Weygandt, C. J., Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ., concur."

QUESTIONS RAISED BY PETITIONERS AND ANSWERS OF RESPONDENT

Question 1 Raised by Petitioners

Is there lack of due process and a violation of the Fourth Amendment of the United States Constitution as extended to the states by Section 1 of the Fourteenth Amendment when a deputy clerk of a municipal court issues warrants for arrest as a ministerial act without determination of probable cause therefor, upon the filing of an affidavit with said deputy charging a misdemeanor?

Answer to Question No. 1

The affidavit filed with the deputy clerk charges a misdemeanor under Section 13 of Ordinance 16922 of the City of Dayton, Ohio, in that appellants Focke and Creager

violated certain provisions of the City of Dayton Income Tax Ordinance.

The affidavits questioned were executed before one Virginia D. Richards, a Deputy Clerk of the Dayton Municipal Court. After the execution of the affidavit a warrant for the petitioner issued. In issuing the warrant the law of the State of Ohio was fully complied with.

The power of the Clerk of Courts is found, among other places, in Revised Code of Ohio Section 2935.10.

> *Sec. 2935.10 RC WHO MAY ISSUE WARRANTS.*
> Any judge or clerk of a court of record, or of any municipal court, or any magistrate, may issue process for the arrest of a person charged with an offense returnable in the court having jurisdiction thereof.

We find the power of the Clerk of Courts also spelled out in the Uniform Municipal Court Act in Section 1901.31 (E) Revised Code of Ohio.

> *Sec. 1901.31 (E) RC CLERK OF COURT*
> The clerk of a municipal court shall have general powers to administer oaths, take affidavits, * * * power to issue and sign all writs, process, subpoenas, and papers issuing out of the court, and to attach the seal of the court thereto.

We find the duties of a deputy clerk of such courts are set forth in section (H) of the above cited statute.

> *Sec. 1901.31 (H) RC DEPUTY CLERKS*
> Deputy clerks may be appointed by the clerk.
> Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. * * *.

We also find it specifically stated in Section 3.06 Revised Code of Ohio that a deputy, when duly qualified,

may perform the duties of his principal. This section applies to deputy clerks of courts.

> *Sec. 3.06 RC DEPUTIES AND CLERKS*
> A deputy, when duly qualified, may perform any duties of his principal * * *.

There is no showing that the prosecution was not instituted as the code requires in misdemeanor cases.

> *Sec. 2941.35 RC PROSECUTIONS FOR MISDEMEANORS*
> Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. * * *.

It is not disputed that an affidavit charging an offense was filed before warrant issued.

The judicial decisions of a public officer are those which are left to his own judgment and concerning which he may use his own discretion. Ministerial acts and duties are those concerning which he has no discretion and which he must perform in a particular way. A ministerial act is one which a person performs in a given situation, with stated facts and without regard to the exercise of judgment. The act of issuing a warrant is a ministerial act and not a judicial act.

(a) The great weight of authority holds that the issuance of a search warrant, or a warrant to arrest are ministerial acts. (5 RCL 626)

(b) The issuance of a warrant is a ministerial act * * * (3 Ohio Jurisprudence 150)

(c) Hornack v. Lakewood (10 Ohio Law Abstract 113) decided by our now Chief Justice while he was serving on the bench for the Eighth Appellate District in this state holds in branch 3 of the syllabus:

> 3. Such issuance is a ministerial act and does not require a preliminary finding of probable cause by a judge or magistrate.

(d) The cited branch of the Hornack case (supra) when read in connection with the paragraph from 5 Ruling Case Law (supra) leads to but one reasonable conclusion and that is that the issuance of a warrant for arrest is a purely ministerial act and does not require judicial inquiry.

(e) McGannon v. State (27 Ohio Circuit Courts 245) holds that the issuance of an arrest warrant * * * is ministerial and its performance may be required by mandamus. The DUTY assigned by statute * * * of issuing warrants where the complaint and affidavit are sufficient, is ministerial, and one which may be controlled by judicial process, and mandamus lies * * *. (Emphasis added)

We again cite our Ohio Statutes.

Sec. 2935.11 RC ISSUANCE OF WARRANT. When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he SHALL (IMPERATIVE) issue a warrant for the arrest of the accused. (Emphasis and "IMPERATIVE" added)

To constitute a ministerial act the duties must be so clear and specific that no element of discretion is left in their performance. It is the contention of the City of Dayton that when an affidavit is presented to the Clerk he has the function thereupon to examine the instrument and if it is found to allege a crime HE MUST issue (HE SHALL) issue the warrant. ISSUING THE WARRANT IS A DUTY, NOT THE EXERCISE OF A POWER.

Justice Marshall in the *Roskanski* v. *State* (106 OS 442) stated in 1922 that the practice had been uniform for more than half a century to require nothing more than the filing of an affidavit as the basis for the issuance of a warrant. We contend that the statutory requirement is fulfilled

when the affidavit filed charges the defendant with the commission of a crime, – that is all of the information – all of the formality required.

DUE PROCESS OF LAW

Due process of law is hard to define exactly. It has been held to mean that arbitrary action is prohibited. In *Stewart* v. *Polk County* (1 Amer. Rep. 238) due process of law has been held to mean "judicial proceedings in Court."

Any law which affords a hearing before it condemns, and renders judgment only after trial is not in violation of the constitutional provisions that no citizen shall be deprived of life, liberty, or property without due process of law.

> (Extracted from *Insurance Company* v. *Chowning*, 26 SW 982)

Any system of judicial procedure that does not violate the law of the land does not contravene due process. It has been said that due process of law involves the essential right of notice, hearing, and opportunity to be heard before a competent tribunal.

In the two cases before this Court, prosecution was instituted and has proceeded according to the law of the State of Ohio. Statutory law has been fully complied with. That is all that is required by due process.

PROBABLE CAUSE

The prohibitions in The Fourth Amendment to the Constitution of the United States are directed exclusively against the activities of the Federal Government and have no application to the State of Ohio or any of its agencies.

(*State of Ohio* v. *Lindway*, 131 O.S. 166) Ohio Statutes do not require that an inquiry be made for probable cause before a warrant for arrest issue. No preliminary finding of probable cause by a judge or magistrate is required.

Ohio requires reasonable grounds only for the issuance of a warrant.

> *Sec. 2935.11 RC ISSUANCE OF WARRANT*
> When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.

Probable cause is synonymous with reasonable cause. (*Stacy* v. *Emery*, 97 US 642 at 645)

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed it is sufficient. (*Stacey* v. *Emery*, 97 US at 645)

An affidavit which states that the affiant has reasonable grounds to believe that an offense has been committed is sufficient to *require* the issuance of a warrant. (*State* v. *Gutilla*, 47 OO 251) Emphasis added.

Question No. 2 Raised by Petitioners

Do the petitioners have an adequate remedy at law by way of appeal, which precludes them from resorting to habeas corpus?

Answer to Question No. 2

The petitioners have an adequate remedy at law by way of appeal in these cases, but, have elected to make a collateral and indirect attack in the case rather than resort to the proper method of trial and appeal.

The great weight of authority, we believe, holds that habeas corpus is not the proper remedy to review error, either of fact or law, and that a criminal court is empowered to determine in the first instance the question whether or not an ordinance and statute is violation of an organic law, and that if error intervenes in the decision the defendant has a right to review in the appellate courts where the constitution question may again be raised. This is the sensible rule, and were it not so the writ could be invoked even after conviction and appeal and after the constitutional question had been fully heard and determined in the trial and appellate courts. This would result in interminable delay and confusion albeit no useful purpose would be served.

In petitioner Focke's case the trial court overruled the motion to quash for lack of due process. Instead of the adequate, available, and recognized route of trial and appeal the accused elected to seek the collateral remedy of habeas corpus. In doing so he elected to circumvent and by-pass the remedy available to him and seek relief by prerogative writ.

The law of Ohio conforms to what we consider to be the weight of authority. In *Yutze* v. *Copelan, Chief of Police* (109 O.S. 171) cited by our Supreme Court of Ohio in refusing the writ we find that *habeas corpus will not lie to test the constitutionality of a statute or of an ordinance.*

We are compelled to conclude that the decisions of this court are to the same effect.

In *Ex parte Royall* (117 U.S. 241) Mr. Justice Harlan at page 250 said in the course of his opinion:

> "The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. * * * Nor do their circumstances, as

detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted."

In the later case of *Johnson* v. *Hoy* (227 U.S. 245) Mr. Justice Lamar used the following language:

> "The writ of habeas corpus is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before tried, except in rare and exceptional cases * * *."

In the case *Henry* v. *Henkel* (235 U.S. 219) Mr. Justice Lamar stated in the course of his opinion at page 229:

> "* * * the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court."

The same rule was applied in *In re Gregory* (219 U.S. 210). In the course of his opinion Mr. Justice Holmes said:

> "The only question before us is whether the police court had jurisdiction. A habeas corpus proceedings cannot be made to perform the function of a writ of error."

From the cited decisions of this court and from the law of Ohio as stated in *Yutze* v. *Copelan* (109 O.S. 171) it can safely be concluded that the trial court affords a proper remedy for the petitioners in these cases and that by selection of habeas corpus the wrong remedy was pursued. Pursuit of an improper or a wrong remedy does not render the remedy of trial and appeal less adequate.

WHY WRIT SHOULD BE DENIED

The Courts of the State of Ohio are competent to decide whether the petitioner is or is not illegally restrained of his liberty. We feel that the appropriate time for the determination of these questions is at the trial of the charges filed against petitioners Focke and Creager, and that the detention of the petitioners (constructive detention only) for the sole purpose of securing attendance at the trial is not an improper exercise by a court of its power to hear and decide cases.

(*Ex parte Royall*, 117 U.S. 241)

In branch 2 of the syllabus in *Ex parte Royall* (117 U.S. 241) we find that it is a matter of discretion on the part of the Federal Courts whether or not the Court will exercise jurisdiction in habeas corpus.

> "When a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction of the accused in the State Court, the Circuit Court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States."

In *Robb* v. *Connolly*, 111 U.S. 624 at 637 we find "upon the State Courts, equally with the Courts of the Union rests the obligation to guard, enforce, and protect every

right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever these rights are involved in any suit or proceedings before them."

We are, of course, familiar with the holding in *Ex parte Siebold*, 100 U.S. 371 that an unconstitutional law is void, and is no law and that an offense created by it is not a crime. If the local statute under which warrant issued be repugnant to the Constitution, the prosecution under it has nothing upon which to rest, and the entire proceedings become a nullity.

However, the law of Ohio is that Habeas Corpus cannot be made a substitute for appeal, and petitioners are endeavoring in the *Focke* case to collaterally attack by Habeas Corpus the judgment of the Dayton Municipal Court finding that the affidavit filed was not subject to motions to quash instead of continuing the direct attack by appeal. In the *Creager* case the validity of the warrant was attacked by Habeas Corpus in the Court of Appeals of the Second Appellate District for Ohio and that Court, in the opinion set forth in this brief (at page 3) held that the statutes under which warrant issued was valid. The Supreme Court of Ohio affirmed the Appellate Court.

Petitioner Focke was once before in the Dayton Municipal Court on the same charge prior to the time the present case against him was filed. At that earlier date he invoked the original jurisdiction of the Court of Appeals for the Second Appellate District in an action in Habeas Corpus.

On January 26, 1955, the Ohio Court of Appeals in *State, ex rel Focke* v. *Kirkpatrick, Chief of Police*, sustained the City of Dayton's Motion to Dismiss on the Pleading and on the agreed Statement of Facts. The Court rendered the following opinion:

"By the Court:

"Submitted on motion of respondent to dismiss the petition for writ of habeas corpus. The relator invoked the original jurisdiction of this Court. The facts have been stipulated.

"The relator was arrested by the Police Department of the City of Dayton for a violation of an ordinance of said City. Relator filed the motion to quash, which was overruled. He is now awaiting trial in Municipal Court of Dayton. The stipulated facts do not show that relator is in custody; however, the petition alleges he is being restrained of his liberty by the Chief of Police, and it seems to be conceded by counsel that he is in technical custody.

"The relator contends that the warrant for arrest was improperly issued, which, if all that is claimed is true, would amount to an irregularity which would not deprive the court of jurisdiction and the question could be presented only on appeal.

"The principal ground for issuing the writ is the claim that the city ordinances, the violation of which the relator is charged with, is unconstitutional and void. It is well established in Ohio that the constitutionality of a statute or ordinance cannot be tested by a petition for a writ of habeas corpus. Yutze v. Copelan, 109 O. S. 171, 142 N. E. 33; Ex parte Elicker, 117 O. S. 500, 159 N. E. 478; Calhoun v. Russell, 154 O. S. 81, 93 N. E. (2d) 561; Hamlin v. State, 58 O. L. Abs. 274, 96 N. E. (2d) 426. In Yutze v. Copelan, supra, the syllabus is as follows:

> " 'A writ of habeas corpus will not lie, to test the constitutionality of a statute or ordinance, in favor of one who has been convicted, where the criminal court wherein conviction was obtained had jurisdiction or power to determine the question of constitutionality. In such case the writ cannot be made a substitute for proceedings in error.'

"Unquestionably the Municipal Court of Dayton had jurisdiction and power to determine the question of the constitutionality of the ordinance. That court has jurisdiction of the person and the subject matter. It is axiomatic that habeas corpus will lie only when the court exercising restraint is acting without jurisdiction. Vol. 20, O. Jur. page 429, Section 11. If the Court issuing the process, rendering the judgment, or making the order, had jurisdiction the writ of habeas corpus shall not be allowed. Section 2725.05, R.C.

"Motion to dismiss sustained.

"WISEMAN, P. J., MILLER and HORNBECK, J. J., concur."

CITATIONS BY PETITIONERS NOT DETERMINATIVE OF ANY QUESTIONS INVOLVED IN THESE CASES

We have carefully read and studied the brief of the petitioners and find no cases in point called to this Court's attention. We find that the cited cases concern themselves with search and seizure of evidence and with the admissibility of such evidence at trial. That question is not in issue in this case, and were it in issue the adjective law of Ohio as declared in *State of Ohio* v. *Lindway*, (131 O.S. 166) would be controlling on the Federal Courts.

Bram v. *United States* (168 U.S. 532) which covers the admissibility of confessions made by accused persons is not in any way controlling in this case.

The case *Marron* v. *United States*, (275 U.S. 192) cited by the petitioners covers *search warrants* and *search and seizure* and has no application to the facts in the cases before this court.

The matter of conviction by means of unlawful seizures and enforced confessions was raised in *Weeks* v. *United States* (232 U. S. 383) and has no application to the facts in the instant case before this court. In that case it was held that illegally secured evidence could not be used against an accused over his objections.

In *Ex parte Burford* (3 Cranch's Reports 448) we find no facts or law applicable to the case at bar.

CONCLUSION

Appellants are in constructive custody under process of a State Court in which they are charged with a criminal offense. Bail has not been required to guarantee the appearance of either accused at trial, and it cannot be alleged that a speedy trial without unnecessary delay will be denied either defendant. The question as to the constitutionality of the law by virtue of which the petitioners are before the Court must necessarily arise at trial and be passed upon, and is a question upon which it is competent for the State Courts of Ohio to pass.

We are of the opinion that while this Court has the power to do so, it is within the sound discretion of the Court whether the power to discharge the petitioners on application for writ of Habeas Corpus and before trial be exercised. Exercise of the power by this Court would in effect be to draw to itself the control of all criminal prosecutions commenced in all of the States in the Union whenever the accused alleges that he is illegally restrained of his liberty. The circumstances in this case do not suggest any reason why the State Court of original jurisdiction cannot pass on the validity of all ordinances and statutes ques-

tioned. This Court cannot presume that the decision of the State Courts would be otherwise than is required by the law of the land.

(*Ex parte Royall*, 117 U.S., 241)
(*Ex parte Royall*, No. 2, 117 U.S., 254)

Respectfully submitted,

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JOHN T. FEY, Clerk

No. 384.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

STATE OF OHIO, EX REL. EDWARD W. FOCKE,
Petitioner,

vs.

PAUL J. PRICE, CHIEF, DAYTON POLICE DEPARTMENT,
Respondent.

STATE OF OHIO, EX REL. OTTERBEIN CREAGER,
Petitioner,

vs.

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PETITIONERS' JOINT REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

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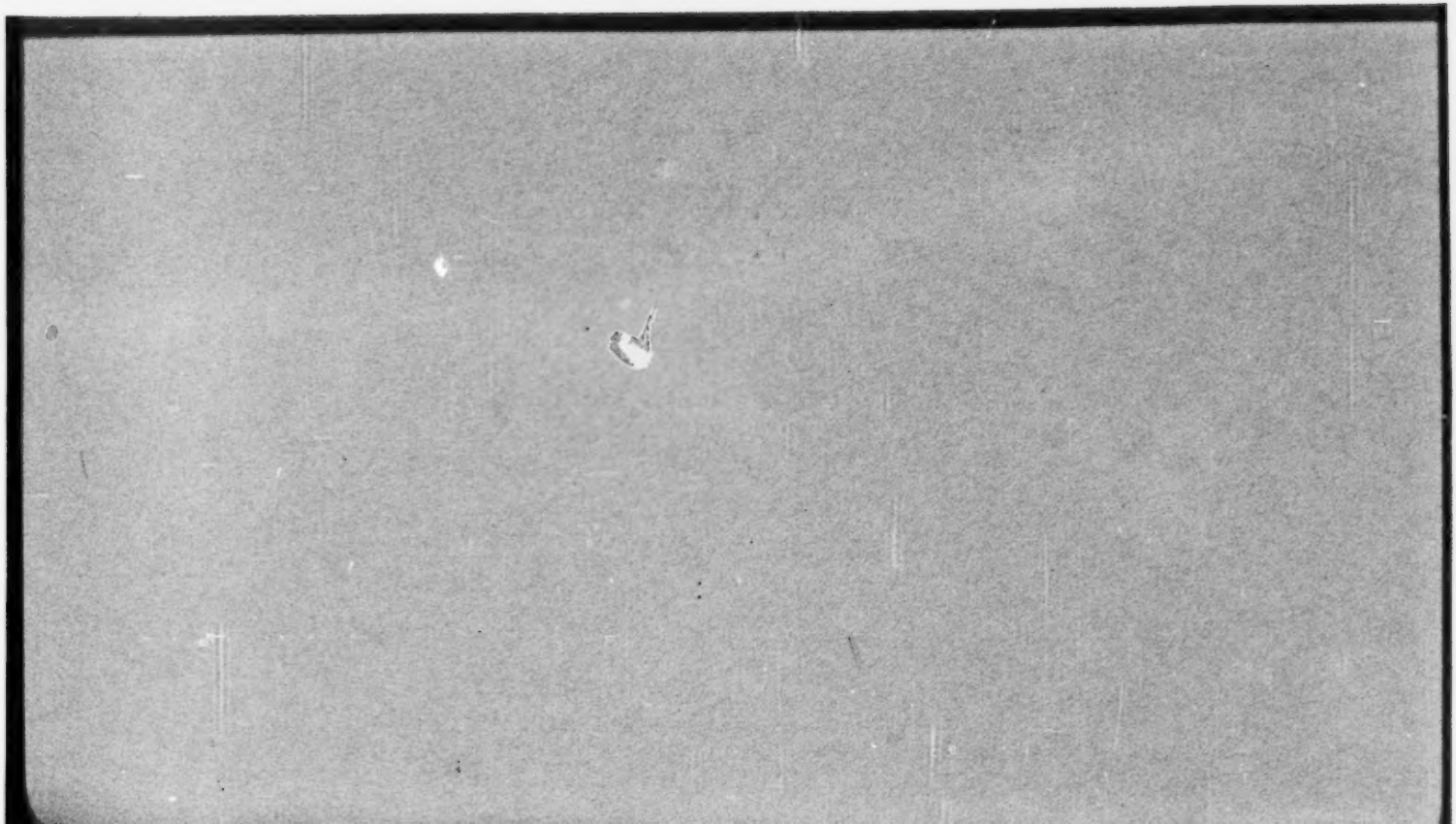

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PETITIONERS' JOINT REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

REPLY TO RESPONDENT'S FIRST ANSWER.

Respondent contends that the issuance of warrants "fully complied with" state law, "does not violate the law of the land," and "is due process of law."

(A) But state law is controlled by the federal "privileges and immunities" imposed upon states by the 14th Amendment, United States Constitution:

U. S. v. Cruikshank, (1875) 92 U. S., 542 (Syl. 8);
Owensboro Waterworks Co. v. Owensboro, Ky., (1906) 26 S. Ct., 249, 200 U. S., 38, 50 L. Ed., 361;
Reagan v. Farmers' Loan etc. Co., (Tex. 1894) 14 S. Ct., 1047, 154 U. S., 390, 38 L. Ed., 1014;
Raymond v. Chicago Union Traction Co., (Ill. 1907) 28 S. Ct., 7, 207 U. S., 20, 52 L. Ed., 78, 12 Ann. Cas., 757;
Louisville etc. R. Co. v. Bosworth, (D. C. Ky., 1913) 209 Fed., 380;
Meyers v. Shields, (CC Ohio, 1894) 61 Fed., 713, 726.

(B) "Due process" required by the 14th Amendment is determined by federal standards, not by state:

Munn v. Illinois, (1876) 94 U. S., 113, at pp. 123, 124, 24 L. Ed., 77, affirming 69 Ill., 80:

> "By the 5th Amendment it was introduced into the Constitution * * * and by this amendment" (14th) "as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states."

Brinkerhoff etc. Co. v. Hill, (1930) 50 S. Ct., 451, 281 U. S., 673, 74 L. Ed., 1107, reversing 19 S. W. 2d, 746, 323 Mo., 180;
Southern Ry. Co. v. Commonwealth, (1933) 54 S. Ct., 147, 290 U. S., 190, 78 L. Ed., 260, reversing 167 S. E., 578, 177 Va., 779.

(C) Ohio law, as interpreted by the Ohio Supreme Court herein, holds issuance of warrants of arrest to be merely a ministerial act, but federal law holds that it requires *judicial* scrutiny to be in due process of law:

U. S. v. Borkowski, (D. C. Ohio, 1920) 268 Fed., 408:

> "* * * Otherwise the conclusion" (as to probable cause) "would be that of the witness and not of the judicial officer in whom alone the Constitution has

vested the extraordinary power to issue search warrants, and who is thus charged with the duty of preventing unreasonable searches and seizures."

Rose v. U. S., (CCA Neb., 1930) 45 Fed. 2d, 459, syl. 6.

Matter of Rule of Court (CC Ga., 1877) 3 Woods, U. S., 502:

(By Mr. Justice Bradley) "It is plain from this fundamental enunciation" (U. S. Constitution Amendment) "as well as from the books of authority on criminal matters in the common law that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to the official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty, and this ground must amount to a probable cause of belief or suspicion of the party's guilt."

This allusion to the common law is corroborated by *Blackstone's Commentaries* (by (Chitty), Vol. 2, Book 4, Chapter 21, "Of Arrests," pp. 234, 235, where the history of process of arrest in England is traced back to Sir Edward Coke, showing how carefully English courts safeguarded the liberty of the subject against arbitrary arrest, by requiring advance judicial scrutiny before issuance of warrants.

This essential feature of "due process of law" crossed the Atlantic with American colonists, and is embodied in the 4th, 5th, and 14th Amendments of the U. S. Constitution as "the law of the land":

Murray v. Hoboken Land etc. Co., (N. Y., 1856) 18 How., 272, at 276-277:

(By Curtis, J.) "* * * it is not left to the legislative power to enact any process which might be devised. The article" (5th Amend.) "is a restraint on

> the legislative as well as on the executive and judicial power of the government."

Since the enactment of the 14th Amendment, this same restraint controls states:

> *Slaughterhouse Cases,* (La., 1873) 16 Wall., 73, 21 L. Ed., 394;
> *Elk v. Williams,* (Nebr., 1884) 5 S. Ct., 41, 112 U. S., 101, 28 L. Ed., 643;
> *Owensboro Waterworks Co. v. Owensboro, Ky.,* (1906) 26 S. Ct., 249, 200 U. S., 38, 50 L. Ed., 361.

(D) The issuance of warrant as "ministerial act," without judicial scrutiny, upon the filing of a sworn accusation, makes the "security" guaranteed by the 4th and 14th Amendments a hollow mockery, puts all power in accuser to deprive his neighbor of liberty by arbitrary arrest, reduces the machinery of law to acting as the tool and obedient servant of the accuser. We respectfully insist this is not "security against unreasonable * * * seizure," nor "due process."

II.

REPLY TO RESPONDENT'S SECOND ANSWER.

(A) Respondent maintains petitioners have adequate remedy at law by appeal, which precludes them from resorting to habeas corpus.

That position necessarily assumes that the Municipal Court acquired jurisdiction of these petitioners' persons in spite of unlawful issuance of warrant. How did it acquire it? Respondent mentions Focke's motion in Municipal Court to quash, which was overruled. But Focke expressly appeared only for the purpose of disputing jurisdiction of that court over his person for lack of due process. Such

motion expressly for only such purpose does not enter general appearance, provided no dispute is made on the merits of the case. Ohio law is settled on that:

27 *Ohio Juris,* p. 767, Motions & Orders, Sec. 13;
2 *Ohio Juris.* 2d, pp. 507 et seq., Appearances, Secs. 10, 20;
Smith v. Hoover, 39 Ohio St., 249, syl. 3;
Elliott v. Lawhead, 43 Ohio St., 171, 1 N. E., 575, syl. 5;
Greene v. Woodland Ave. etc. St. Ry. Co., 62 Ohio St., 67, syl. 2;
Hayes v. Kentucky Joint St. etc. Bank, 125 Ohio St., 359;
Maloney v. Callahan, 127 Ohio St., 387, 188 N. E., 656.

Respondent cites a former case, *State, ex rel. Focke, v. Kirkpatrick, Chief, etc.,* No. 2317, Court of Appeals, which concerned a former arrest, filed the previous year in Municipal Court of Dayton for a similar alleged misdemeanor. Focke combated that charge first by motion to quash for lack of jurisdiction by the Municipal Court of his person, and next by petition to the Court of Appeals for habeas corpus. The Court of Appeals sustained respondent's motion to dismiss in that case, in an opinion filed therein January 26, 1955, for the reason he had included in his grounds a contention that the city income tax ordinance was unconstitutional and void; which was ruled to be improper for habeas corpus, citing *Yutze v. Copelan,* supra, et al. (That former case is now pending in the Common proper for habeas corpus, citing *Yutze v. Copelan, et al.,* supra. (That former case is now pending in the Common Pleas Court of Montgomery county.) In the case now at bar, however, Focke confined his grounds for habeas corpus exclusively to the unlawful issuance of warrant. The Court of Appeals' denial of respondent's motion this time

marks the difference as to Focke's "appearance" in Municipal Court.

But Creager never appeared for any purpose in Municipal Court but petitioned at once the Court of Appeals for habeas corpus, basing it exclusively on lack of jurisdiction of his person because of unlawful issuance of warrant.

Where and how, then, could these petitioners, or either of them, be ruled to have adequate remedy at law by appeal? Neither has forfeited his privilege of habeas corpus. To deny them that privilege is to "suspend the writ," in contravention of Art. I, Sec. 8, Ohio Constitution, and of Ohio Revised Code Sec. 2725.01-.06. It deprives them of liberty without due process of law.

Respectfully submitted,

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